

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re:	Joel E. Short et al.	Confirmation No.:	8652
Appl. No.:	09/693,481	Group Art Unit:	2155
Filed:	October 20, 2000	Examiner:	Wang, Liang Che A
For:	SYSTEMS AND METHODS FOR DYNAMIC BANDWIDTH MANAGEMENT ON A PER SUBSCRIBER BASIS IN A COMMUNICATION NETWORK		

FILED VIA USPTO E-FILING

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

REPLY BRIEF UNDER 37 CFR § 1.193(b)(1)

This Reply Brief is filed in response to the Examiner's Answer mailed on October 9, 2007, the Examiner's Answer being in response to a Supplemental Appeal Brief (hereinafter "Appeal Brief") filed August 6, 2007. This Reply Brief addresses various points raised by the Examiner's Answer.

3. ***Status of Claims.***

Although the Examiner's Answer indicates that the status of claims in the Appeal Brief is correct, Appellants respectfully note that page 18 of the Examiner's Answer has indicated that claim 10 is allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. Accordingly, the status of claims is updated as follows.

The present application currently includes claims 1, 3, 6, 8-13 and 28-35, of which claims 1, 3, 6, 8, 9, 11-13 and 28-35 stand rejected. Claim 10 stands objected to as being dependent from a rejected base claim.

6. ***Grounds of Rejection to be Reviewed on Appeal.***

Independent claims 28 and 33 currently stand rejected under 35 U.S.C. §103(a) as being unpatentable over Ayres (U.S. Patent No. 6,738,371) in view of Sherman (U.S. Patent No. 5,978,387). Independent claim 1 and dependent claim 35 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Ayres in view of Sherman and further in view of Jones et al. (U.S. Patent No. 6,307,836, hereinafter "Jones"). Claim 3 currently stands rejected under 35 U.S.C. §103(a) as being unpatentable over Ayres in view of Sherman and Jones and further in view of

Gulliford et al. (U.S. Patent No. 6,618,355, hereinafter "Gulliford"). Claim 6 currently stands rejected under 35 U.S.C. §103(a) as being unpatentable over Ayres in view of Sherman and Jones and further in view of Salkewicz (U.S. Patent No. 6,609,153). Claims 8, 9, 11, 13, 29-32 and 34 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Ayres as modified by Sherman and/or Jones in view of Fowler (U.S. Patent No. 5,793,978). Claim 12 currently stands rejected under 35 U.S.C. §103(a) as being unpatentable over Ayres in view of Sherman and Fowler and further in view of Barton (U.S. Patent No. 6,310,886).

Claims 2, 4, 5, 7 and 14-27 were previously canceled. As indicated above, the Examiner's Answer has withdrawn the previous rejection of claim 10 as being rejected under 35 U.S.C. §103(a) as being unpatentable over Ayres as modified by Sherman and/or Jones in view of Fowler (U.S. Patent No. 5,793,978). Accordingly, Appellants hereby appeal the rejections of claims 1, 3, 6, 8, 9, 11-13 and 28-35.

7. ***Argument.***

As explained in the Appeal Brief at pages 4-11, claims 1, 3, 6, 8, 9, 11-13 and 28-35 are patentably distinct from the cited references, taken individually or in combination. Accordingly, Appellants respectfully request that the aforementioned rejections be reversed.

In reply to the Examiner's Answer, Appellants again submit that the cited references, either alone or in combination, fail to teach or suggest the recited features of the claimed invention. The Examiner's Answer is, in large part, simply a repeat of the same recitations used in the final Office Action in rejecting the currently pending claims. As such, Appellants respectfully submit that since the Appeal Brief pointed out the flaws in the Examiner's reasoning with respect to these rejections, no further discussion of the issues previously addressed need be presented herein. Rather, Appellants will direct the comments presented herein toward responding to the specific assertions from the "Response to Argument" section of the Examiner's Answer (pages 15-18).

10. ***Response to Argument.***

The Examiner's Answer responded to Appellants' arguments under subsections B, C, D and E of section 7 of the Appeal Brief, and presented those arguments in corresponding subsections 1, 2, 3 and 4 of the Examiner's Answer. Accordingly, Appellant addresses the

Examiner's positions below under the same subsections as those presented in the Examiner's Answer.

1. Independent claim 1 is patentable over Ayres, Sherman and Jones

Independent claim 1, which stands rejected over the combination of Ayres, Sherman and Jones, recites, *inter alia*, retrieving from memory a subscriber profile that includes a first subscriber-selected bandwidth for information being sent to a network and separately retrieving a second subscriber-selected bandwidth for information being retrieved from a network, the first and second subscriber-selected bandwidths being separate. Appellants pointed out at page 6 of the Appeal Brief that Jones merely describes that users select via a subscriber interface device, a variable number of upstream and downstream bearer channels from the network. There is no mention that the bandwidths of these channels may be separately subscriber-selected.

The Examiner's Answer states at page 16 that "Ayres teaches a subscriber profile with subscriber-selected bandwidth (Figure 3, Col 8 lines 33-35, 38-44), and Jones suggests there are two subscriber-selected bandwidths, and the two subscriber-selected bandwidth being separate (Col 4 lines 46-53)." Notably, the Examiner attempts to show support for the assertion above by citing col. 6, lines 55-60 of Ayres (see Examiner's Answer, page 16). In this regard, the Examiner asserts that col. 6, lines 55-60 of Ayres discloses that the upstream and downstream bearer channels have a bandwidth. However, Appellants respectfully submit that the statement that Jones suggests two separate subscriber-selected bandwidths is incorrect.

In this regard, Appellants respectfully note that Jones discloses a user selection of the number of upstream and downstream data channels (col. 4, lines 46-53), as described above, and the provision of transport bandwidth to the user in accordance with the subscriber's profile (col. 9, lines 47-56). However, even if the upstream and downstream data channels have a corresponding bandwidth, a combination of the teachings of Jones as set forth in the cited passages would result instead merely in a user selected number of channels in the upstream and downstream directions in which each of the channels has the same bandwidth identified in the subscriber's profile. There is no disclosure in Jones regarding separate bandwidths for the upstream and downstream data channels. Moreover, the combination of the disclosure of Ayres does not cure this deficiency since, even if the Examiner's assertions are taken to be true, Ayres only discloses at best "a subscriber profile with subscriber selected bandwidth" and also fails to

teach or suggest that separate subscriber-selected bandwidths may be retrieved for information sent to and retrieved from a network. Sherman includes no disclosure related to this feature and is not relied upon as such. Accordingly, individually or in combination, Sherman, Ayres and Jones fail to teach or suggest retrieving from memory a subscriber profile that includes a first subscriber-selected bandwidth for information being sent to a network and a second subscriber-selected bandwidth for information being retrieved from a network, the first and second subscriber-selected bandwidths being separate as claimed in independent claim 1.

Thus, independent claim 1 is patentable over the cited references. Accordingly, Appellants respectfully request reversal of the rejections of independent claim 1.

2. Independent claim 28 is patentable over Ayres and Sherman

Independent claim 28 stands rejected over the combination of Ayres and Sherman. Independent claim 28 recites, *inter alia*, determining if the transfer rate for data packet transmission should be adjusted based on a priority of the data packet.

The Examiner's Answer asserts at page 17 that Ayres discloses the above recited feature at col. 8, lines 33-37 in combination with col. 1, lines 67 to col. 2, line 4. In this regard, the Examiner merely repeats the arguments previously addressed in the Appeal Brief. Appellants have answered these arguments previously at pages 7-9 of the Appeal Brief.

Accordingly, for the reasons expressed at pages 7-9 of the Appeal Brief, Appellants respectfully submit that the rejection of independent claim 28 should be reversed.

3. Independent claim 33 is patentable over Ayres and Sherman

Independent claim 33 stands rejected over the combination of Ayres and Sherman. Independent claim 33 recites, *inter alia*, performing a packet translation function to enable the subscriber to access any network without re-configuration of a host device of the subscriber. As described, for example, at page 9, lines 18-23, the packet translation function properly formats incoming packets for the user/subscriber's host at the gateway device. Accordingly, in addition to conventional routing services, the gateway device according to the claimed invention further performs the packet translation function in order to properly format incoming packets for the host device.

The Examiner's Answer again cites Ayres as disclosing such feature at col. 4, line 67 to col. 5, line 10. However, the cited passage of Ayres simply describes conventional packet routing. In this regard, Ayres describes the forwarding of packets based on routing information. There is no disclosure in the cited passage, or indeed in any part of Ayres regarding performing a packet translation function as described in the claimed invention. Furthermore, there is no disclosure in the cited passage to suggest that "data packet are transferred among Internet and users without the need of configuration of router" as alleged in the Office Action. Indeed, the cited passage and all of Ayres fails to provide any indication that users need not reconfigure the router, and in fact fails to even consider that packet translation may be required in certain instances to avoid such a reconfiguration of the router.

Notably, the Examiner's Answer asserts (see page 17) that normal operation of data routing "does not require the re-configuration of a router, and so is the re-configuration of the host device unless otherwise indicated a necessary reconfiguration." Appellants initially note that, no support for such conclusion is provided from Ayres or any other reference. Moreover, the Examiner offers no reference to indicate what "normal operation of data routing" would be considered to entail by one of skill in the art at the time the present invention was made. Since the cited references do not disclose the material asserted by the Examiner as described above, it is believed that the Examiner is using personal knowledge to fill in the gaps between the claimed invention and the cited references. The Examiner can use "common knowledge" in a rejection by taking official notice of a fact, however, according to MPEP 2144.03, it is not appropriate to do so unless the facts asserted are capable of instant and unquestionable demonstration as being well-known. Additionally, as was stated in MPEP 2144.03 regarding *In re Zurko*, 258 F.3d 1379, 1385, 59 USPQ2d at 1697, "the Board cannot simply reach conclusions based on its own understanding or experience – or on its assessment of what would be basic knowledge or common sense. Rather, the Board must point to some concrete evidence in the record in support of these findings." Since no basis can be found for the Examiner's statements can be found in Ayres, Appellant "seasonably challenges" the Examiner's use of personal knowledge to fill in the gap under MPEP 2144.03. Appellant respectfully notes that since the assertion at page 17 of the Examiner's Answer that normal operation of data routing "does not require the re-configuration of a router, and so is the re-configuration of the host device unless otherwise

indicated a necessary reconfiguration” was not previously provided in prior rejections, this reply is Appellant’s first opportunity to challenge the Examiner’s use of personal knowledge.

Moreover, Appellants respectfully point out that even if the Examiner is personally aware of current data routing operations that may not require reconfiguration of a router or host device, the Examiner cannot incorporate such knowledge as hindsight in asserting that the claimed invention would be an obvious modification to the disclosure of Ayres. In this regard, even if current systems have features similar to features claimed, such disclosure would not represent prior art with respect to the claimed invention and would not be indicative of what would be known to one of skill in the art at the time the present invention was made. Accordingly, Appellants respectfully submit that the Examiner has improperly used personal knowledge in making the current rejection. Ayres fails to teach or suggest performing a packet translation function to enable the subscriber to access any network without re-configuration of a host device of the subscriber as recited in independent claim 33 and the Examiner’s attempt to use personal knowledge to cure the deficiency of Ayres is not proper.

Sherman similarly fails to teach or suggest performing a packet translation function to enable the subscriber to access any network without re-configuration of a host device of the subscriber as recited in independent claim 33 and is not cited as such. Since the cited references each fail to teach or suggest the recited feature of independent claim 33, any combination of the cited references likewise fails to teach or suggest the recited feature as claimed in independent claim 33. Thus, independent claim 33 is patentable over the cited references. Accordingly, Appellants respectfully submit that the rejection of independent claim 33 should be reversed.

4. Dependent claims 3, 6, 8-13, 29-32, 34 and 35 are patentable over the cited references

In this section of the Examiner’s Answer, the Examiner indicated that claim 10 is now considered allowable. This indication is acknowledged by Appellants. However, Appellants still maintain that, at least due to their dependence from patentable independent claims for the reasons stated above and in the Appeal Brief, dependent claims 3, 6, 8, 9, 11-13, 29-32, 34 and 35 are patentable for at least those reasons given for independent claims 1, 28 and 33.

Accordingly, for all the reasons stated above, Appellants respectfully submit that the rejections of claims 1, 3, 6, 8, 9, 11-13, 29-32, 34 and 35 should be reversed.

CONCLUSION

For at least the foregoing reasons, as well as those presented in the Appeal Brief, Appellants respectfully request that the rejections be reversed.

Respectfully submitted,



Chad L. Thorson
Registration No. 55,675

CUSTOMER No. 00826
ALSTON & BIRD LLP
Bank of America Plaza
101 South Tryon Street, Suite 4000
Charlotte, NC 28280-4000
Tel Charlotte Office (704) 444-1000
Fax Charlotte Office (704) 444-1111